SUNDRAM A/L RAMASAMY

v.

ARUJUNAN A/L ARUMUGAM & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN, CJ (BORNEO)
TAN SRI DATUK EDGAR JOSEPH JR., SCJ
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH, SCJ
[CIVIL APPEAL NO. 02 - 200 OF 1991]
11 AUGUST 1994

TORT: Road accident - Plaintiff suffering from head and leg injuries - Parties agreeing on the quantum of general damages at RM150,000 - Defendants agreeing to the inclusion of the medical reports "as to maker and contents" - Medical reports making reference to the head injury - Trial Judge finding defendants 100% liable for the accident but holding that the head injury not caused by the collision between the plaintiff and the first defendant - Whether causation was in issue in the trial - Whether defendants entitled to resile from terms of agreement - Whether trial Court's finding against the weight of evidence.

TORT: Road accident - Agreement between parties on amount of general damages for head and leg injuries - Trial Judge finding that head injury not caused by collision - Subsequent agreement on quantum for leg injuries - Whether there was waiver or vacation of the original agreement.

EVIDENCE: Road accident - Plaintiff suffering head injuries - Evidence showing that plaintiff involved in a prior collision with another motorcycle - Trial Judge drawing inference that plaintiff's head injury caused as a result of falling to the ground following the prior collision - Whether such inference reasonable - On whom lies the burden of proving that the head injury was caused by the collision between the plaintiff and the defendant driver - Whether the plaintiff had satisfied the legal burden of proof - Whether the defendants had satisfied the evidential burden of proof.

The plaintiff rider of a motorcycle was involved in a collision with another motorcycle. While the plaintiff was lying in the centre of the road, he was run over by a car driven by the first defendant. The plaintiff suffered head and leg injuries and sued the defendants for damages.

During the trial the parties informed the Court that they had agreed on the quantum of general damages at RM150,000 (the first agreement) and only the question of liability was in dispute. The defendants also agreed to the inclusion of the medical reports, on the plaintiff, in evidence with the result that the medical experts were not called to give evidence. The medical reports made reference to the head and leg injuries suffered by the plaintiff as a result of the collision.

At the end of the trial the learned Judge found the defendants to be 100% liable for the accident but went on to uphold the defendants' submission that the plaintiff had failed to prove on a balance of probability that the head injury was caused by the collision with the car driven by the first defendant, the contention being that the head injury was caused by the earlier collision with the other motorcycle. After the decision, the parties entered into a subsequent agreement (the second agreement) whereby the quantum of general damages was agreed at RM10,000.

The question that arose on appeal by the plaintiff was whether, in view of the first agreement whereby the parties had agreed on the quantum of damages, causation was in issue in the trial. The other question to be decided was whether the second agreement constituted a waiver or vacation of the first agreement.

Held:

Per Haji Mohd. Jemuri Bin Serjan CJ (Borneo) & Edgar Joseph Jr. SCJ

[1] The conduct of the litigation by Counsel for the defendant, subsequent to the entering into of the first agreement, in agreeing to the medical reports on the plaintiff "as to maker and contents", which covered all injuries, including the head injury, confirms that Counsel for the defendants was representing to the Court and to his opponent, that causation with regard to the head injury, was no longer in issue.

[2] As a result of relying on the representation of Counsel for the defendants, Counsel for the plaintiff was induced to refrain from calling the medical witnesses whose testimony would have been most material to the issue of causation. In the circumstances, the first agreement was binding on Counsel for the defendants and he should not be allowed to resile from it.

[3] It follows that the meaning and effect of the first agreement, having regard to the common intention of the parties, was that causation was no longer in issue when the trial commenced; the only remaining issue being negligence, in the sense of fault or blameworthiness as between the plaintiff and the defendant driver.

[4] It is manifestly clear that the second agreement was merely consequential on the trial Judge's finding that the defendant driver had only caused the injury to the plaintiff's leg and not the injury to his head. By the second agreement Counsel were merely relieving the trial Judge of the task of assessing general damages for the leg injury. It could not amount to a waiver of the first agreement simply because there never was any intention to waive.

[5] The primary submission of Counsel for the defendants was a denial of causation with regard to the head injury, namely that that injury had been caused as a result of the prior collision involving the plaintiff and the other motorcycle. However this point was not pleaded with sufficient particularity in the statement of defence, as it undoubtedly should have been, with the result that the plaintiff was taken by surprise.

[6] It was neither right nor fair to find that the plaintiff's head injury had been caused as a result of the prior collision involving the plaintiff's motorcycle and the other motorcycle. There was a clear breach of the rule of natural justice embodied in the maxim: *Audi alteram partem*, when the trial Judge found that the plaintiff's head injury was the direct result of the prior collision with the other motorcycle, considering that the other motorcyclist never had the opportunity of being heard.

[7] In the present case, there were no objective facts from which it could be inferred, as a matter of reasonable probability, that the plaintiff had sustained the head injury as a result of falling to the ground following the prior collision with the other motorcycle. Whilst it was possible that he had sustained the head injury in that way, it was equally possible that he had not. In the circumstances it would be pure conjecture or a mere guess to say that the plaintiff's head injury had been caused as a result of his falling to the ground following the prior collision with the other motorcycle.

[8] On the contrary, there were objective facts which clearly indicated that the defendant driver's car had collided into the plaintiff while he lay on the road. In the absence of evidence to the contrary, - and there was none - it could reasonably be inferred from the objective facts that both the leg injury and the head injury had been caused by the collision involving the defendant's car.

[9] Regard being had to the circumstances of the case, once the plaintiff had established that he had been struck by the defendant driver's car, while he lay across the white centre line of the road, there was a *prima facie* case that both the leg injury and the head injury had been caused by the defendant driver's car. The evidential burden of proof then shifted to the defendant driver to rebut the *prima facie* case by showing that only the leg injury and not the head injury had been caused by him, since this was a matter especially within his knowledge.

[10] In this case the defendant driver, who was present in Court and was the only person who had the necessary knowledge to testify as to the question of causation point, had elected not to give evidence. This omission by the defendant driver to testify only went towards strengthening the inference that could reasonably be drawn from the facts proved by the plaintiff.

[11] The defendants having through their Counsel, elected to call no evidence, had clearly failed to rebut the *prima facie* case established at the close of the case for the plaintiff that both the leg injury and the head injury had been caused by the defendant driver's car. Therefore the trial Judge's finding on the issue of causation in favour of the defendant driver was against the weight of the evidence and should be reversed.

Per Mohamed Dzaiddin Bin Haji Abdullah SCJ

[1] The onus of proving causation always lies on the plaintiff. A plaintiff must prove on a balance of probabilities that it was the defendant who caused all his injuries. It is a question of fact whether any particular head of damage is caused by a defendant's negligence or breach of statutory duty. If a plaintiff fails to establish that the defendant caused the harm of which he complains, or some part of it, then his action will fail.

[2] In the present case there was no evidence to suggest that all the other injuries sustained by the plaintiff were caused by or were the direct result of the collision between the plaintiff and the first defendant driver. It would be a matter of conjecture to hold that the brain injury was the direct result of the first defendant's negligence when the trial Judge had come to the conclusion that there was no other evidence which showed that the first defendant was responsible for all the injuries suffered by the plaintiff. Looking at the available evidence and bearing in mind that neither the plaintiff nor the first defendant gave evidence, the learned trial Judge had drawn the correct inferences from the facts as found by him.

[3] From the evidence as found by the trial Judge, the plaintiff's brain injury would appear to be more consistent with his falling from his motorcycle as a result of the collision with the other motorcycle rather than due to his right leg being run over by the first defendant's motorcar. In the circumstances the plaintiff has failed to prove, on a balance of probabilities, that his other injuries, aside from the leg injury, were caused by the first defendant's negligence in driving his motorcar on the said road at the material time. Accordingly the appeal should be dismissed with costs.

[Appeal allowed with costs. Consequential orders made. Judgment of Court below varied accordingly].

[Bahasa Malaysia Translation of Headnote]

TORT: Kemalangan jalanraya - Plaintif mengalami kecederaan kepala dan kaki - Kedua-dua pihak bersetuju atas kuantum gantirugi am pada RM150,000 - Defendan bersetuju kepada kemasukan laporan perubatan "as to maker and contents" - Laporan perubatan membuat rujukan kepada kecederaan kepala - Hakim Perbicaraan memutuskan defendan bertanggungjawab 100% atas kemalangan tersebut tetapi mengemukakan bahawa kecederaan kepala tidak disebabkan oleh pelanggaran antara plaintif dan defendan pertama - Samada penyebab menjadi isu dalam perbicaraan - Samada defendan berhak untuk berundur daripada terma-terma perjanjian - Samada keputusan Mahkamah perbicaraan menentang pengaruh keterangan.

TORT: Kemalangan jalanraya - Perjanjian antara pihak-pihak atas jumlah gantirugi am untuk kecederaan kepala dan kaki - Hakim perbicaraan memutuskan bahawa kecederaan kepala tidak disebabkan oleh pelanggaran - Perjanjian yang berikutnya atas kuantum bagi kecederaan kaki - Samada terdapat pengenepian atau pembatalan perjanjian asal.

KETERANGAN: Kemalangan jalanraya - Plaintif mengalami kecederaan kepala - Keterangan menunjukkan bahawa plaintif telah terlibat dalam satu pelanggaran sebelum ini dengan motosikal yang lain - Hakim perbicaraan membuat kesimpulan bahawa kecederaan kepala plaintif disebabkan akibat daripada jatuh ke tanah ketika perlanggaran yang sebelum ini - Samada kesimpulan sedemikian wajar - Ke atas siapa bergantungnya beban membukti bahawa kecederaan kepala itu telah disebabkan oleh pelanggaran antara plaintif dan defendan pemandu - Samada plaintif telah memenuhi beban membukti yang sah - Samada defendan telah memenuhi keterangan beban membukti.

Plaintif yang merupakan penunggang sebuah motosikal telah terlibat dalam satu pelanggaran dengan sebuah motosikal yang lain. Ketika plaintif terbaring di tengah-tengah jalan, beliau telah dilanggar oleh sebuah kereta yang telah dipandu oleh defendan pertama. Plaintif mengalami kecederaan kepala dan kaki dan mendakwa defendan untuk gantirugi.

Ketika perbicaraan tersebut kedua-dua pihak telah memaklumkan Mahkamah bahawa mereka telah bersetuju atas kuantum gantirugi am pada RM150,000 (persetujuan pertama) dan hanya persoalan tanggungan dipertikaikan. Defendan telah juga bersetuju dengan penyertaan laporan-laporan perubatan, ke atas plaintif, dalam keterangan dengan keputusan pakar-pakar perubatan telah tidak dipanggil untuk memberikan keterangan. Laporan perubatan tersebut merujuk kepada kecederaan kepala dan kaki yang dialami oleh plaintif akibat dari pelanggaran tersebut.

Di hujung perbicaraan Tuan Hakim yang bijaksana mendapati defendan bertanggungan 100% atas kemalangan tersebut tetapi mempertahankan penghujahan defendan bahawa plaintif telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa kecederaan kepala itu telah disebabkan oleh pelanggaran dengan kereta yang dipandu oleh defendan pertama, penegasan tersebut adalah bahawa kecederaan kepala telah disebabkan oleh pelanggaran yang lebih awal dengan motosikal lain. Selepas keputusan itu, pihak-pihak tersebut telah memasuki satu perjanjian yang berikutnya (persetujuan kedua) di mana kuantum gantirugi am telah dipersetujui pada a RM10,000.00.

Persoalan yang timbul atas rayuan oleh plaintif adalah samada, memandangkan persetujuan pertama di mana pihak-pihak tersebut telah bersetuju ke atas kuantum gantirugi, penyebab telah menjadi isu dalam perbicaraan tersebut. Persoalan lain yang

harus diputuskan adalah samada persetujuan kedua membentuk satu pengenepian atau pembatalan persetujuan pertama.

Diputuskan:

Per Haji Mohd. Jemuri Bin Serjan HB (Borneo) & Edgar Joseph Jr. HMA

[1] Pengendalian litigasi oleh peguam bagi pihak defendan, berikutan dengan memasuki persetujuan pertama, dalam menyetujui kepada laporan-laporan perubatan ke atas plaintif "as to maker and contents", yang mana merangkumi semua kecederaan, termasuk kecederaan kepala, mengesahkan bahawa peguam bagi pihak defendan telah mengemukakan kepada Mahkamah dan kepada lawannya, bahawa penyebab berhubung dengan kecederaan kepala, tidak lagi menjadi isu.

[2] Akibat bergantung atas pengemukaan peguam bagi pihak defendan, peguam bagi pihak plaintif didorong untuk menahan diri daripada memanggil saksi-saksi perubatan yang mana testimoni mereka akan menjadi amat penting kepada isu penyebab. Dalam keadaan tersebut, persetujuan pertama mengikat peguam bagi pihak defendan dan beliau tidak seharusnya dibenarkan untuk berundur daripadanya.

[3] Adalah didapati bahawa maksud dan kesan persetujuan pertama, berhubung dengan niat bersama pihak-pihak tersebut, adalah bahawa penyebab tidak lagi menjadi isu apabila perbicaraan bermula; isu yang tinggal hanyalah kecuaian, dalam segi kesalahan atau yang patut dipersalahkan antara plaintif tan pemandu defendan.

[4] Ianya adalah amat jelas bahawa persetujuan kedua hanyalah berakibat pada keputusan Hakim perbicaraan bahawa defendan pemandu telah hanya menyebabkan kecederaan pada kaki plaintif dan bukan kecederaan pada kepalanya. Melalui persetujuan kedua peguam hanya meringankan Hakim perbicaraan daripada tugas menilaikan gantirugi am untuk kecederaan kaki tersebut. Ianya tidak boleh membawa kepada pengenepian persetujuan pertama semata-mata kerana tidak pernah terdapat apa-apa niat untuk mengenepikan.

[5] Penghujahan utama peguam bagi pihak defendan adalah penafian penyebab berhubung dengan kecederaan kepala, iaitu bahawa kecederaan itu telah disebabkan akibat daripada pelanggaran awal yang melibatkan plaintif dengan motosikal yang lain itu. Walaubagaimana pun perkara ini telah tidak diplidkan dengan seberapa tepat yang boleh dalam pernyataan pembelaan tersebut, sepertimana ia seharusnya dibuat, dengan akibat yang mana plaintif dikejutkan.

[6] Ianya tidak adil mahupun betul untuk memutuskan bahawa kecederaan kepala plaintif telah disebabkan akibat daripada pelanggaran yang terlebih dahulu melibatkan motosikal plaintif dan motosikal yang lain itu. Terdapat dengan ketaranya kemungkiran rukun keadilan asasi yang dimuatkan dalam bidalan: *Audi alteram partem*, apabila Hakim perbicaraan mendapati bahawa kecederaan kepala plaintif adalah diakibatkan sebenarnya oleh pelanggaran yang terlebih dahulu dengan motosikal yang lain itu, memandangkan bahawa penunggang motosikal yang lain itu tidak pernah diberikan peluang untuk didengar.

[7] Dalam kes semasa ini, tidak terdapat fakta-fakta objektif daripada mana boleh disimpulkan, sebagai satu perkara kebarangkalian yang wajar, bahawa plaintif telah menanggung kecederaan kepala tersebut akibat jatuh ke tanah selepas pelanggaran yang terlebih dahulu dengan motosikal yang lain itu. Sementara ianya berkemungkinan bahawa beliau telah menanggung kecederaan kepala dengan cara tersebut, begitu juga

adalah berkemungkinan beliau tidak mengalaminya. Dalam keadaan tersebut ianya merupakan satu tekaan semata-mata bagi menyatakan bahawa kecederaan kepala plaintif telah disebabkan akibat dari jatuh ke tanah ketika pelanggaran yang terlebih dahulu dengan motosikal yang lain itu.

[8] Sebaliknya, terdapat fakta-fakta objektif yang dengan jelasnya menunjukkan bahawa kereta defendan pemandu telah melanggar plaintif ketika beliau terbaring di atas jalan. Dalam ketiadaan keterangan yang bertentangan, - dan sememangnya tiada - adalah dengan wajarnya boleh disimpulkan daripada fakta-fakta objektif tersebut bahawa kedua-duanya kecederaan kaki tan kepala tersebut telah disebabkan oleh pelanggaran yang melibatkan kereta defendan.

[9] Berhubung dengan keadaan kes ini, sebaik sahaja plaintif telah menentukan bahawa beliau telah dilanggar oleh kereta defendan pemandu, ketika beliau terbaring merintangi garisan puteh di tengah-tengah jalan, terdapat kes *prima facie* bahawa kedua-dua kecederaan kepala dan kaki telah disebabkan oleh defendan pemandu kereta. Keterangan beban membukti kemudiannya beralih kepaa defendan pemandu untuk menolak kes *prima facie* bahawa hanya kecederaan kaki dan bukannya kecederaan kepala telah disebabkan oleh beliau, oleh kerana ini adalah perkara yang terutama dalam pengetahuannya.

[10] Dalam kes ini defendan pemandu, yang hadir di Mahkamah dan merupakan satu-satunya orang yang mempunyai pengetahuan yang perlu untuk memberikan keterangan berhubung dengan persoalan perkara penyebab, telah memilih untuk tidak memberikan keterangan. Kegagalan oleh defendan pemandu untuk memberikan keterangan hanya menguatkan lagi kesimpulan yang boleh dihasilkan dengan wajarnya daripada fakta-fakta yang dibuktikan oleh plaintif.

[11] Defendan, melalui peguam mereka, dalam memilih untuk tidak memanggil apa-apa keterangan, telah dengan jelasnya gagal untuk menolak kes *prima facie* yang ditentukan di penutupan kes tersebut bagi plaintif bahawa kedua-duanya kecederaan kaki dan kepala telah disebabkan oleh kereta defendan pemandu. Oleh yang demikian, keputusan Hakim perbicaraan mengenai isu penyebab yang memihak defendan pemandu adalah bertentangan dengan pengaruh keterangan dan seharusnya diakaskan.

Per Mohamed Dzaiddin bin Haji Abdullah HMA

[1] Beban membuktikan penyebab sentiasa bergantung pada plaintif. Seseorang plaintif mestilah membuktikan atas imbangan kebarangkalian bahawa ianya adalah defendan yang telah menyebabkan kesemua kecederaannya. Ianya merupakan satu persoalan fakta samada mana-mana tajuk kecederaan yang khusus telah disebabkan oleh kecuaian atau kemungkiran tugas berkanun seseorang defendan. Jika seseorang plaintif gagal untuk menentukan bahawa defendan telah menyebabkan kecederaan yang diadukan olehnya, atau pun mana-mana bahagian daripadanya, maka tindakannya akan gagal.

[2] Dalam kes semasa ini tidak terdapat keterangan untuk menyarankan bahawa kesemua kecederaan-kecederaan lain yang dialami oleh plaintif telah disebabkan oleh atau adalah akibat sebenar perlanggaran antara plaintif dan defendan pertama. Ianya akan merupakan satu perkara tekaan untuk memutuskan bahawa kecederaan otak adalah hasil langsung kecuaian defendan pertama apabila Hakim perbicaraan mencapai keputusan bahawa tidak terdapat keterangan lain yang menunjukkan bahawa defendan pertama adalah bertanggungjawab atas kesemua kecederaan yang dialami oleh plaintif. Memandangkan keterangan yang ada dan mengambil perhatian bahawa

plaintif mahupun defendan pertama telah tidak memberikan keterangan, Tuan Hakim yang bijaksana telah memutuskan satu kesimpulan yang wajar daripada fakta-fakta seperti yang didapati oleh beliau.

[3] Daripada keterangan sepertimana yang didapati oleh Tuan Hakim perbicaraan, kecederaan otak plaintif akan kelihatan lebih bersesuaian dengan kejatuhannya dari motosikalnya akibat pelanggaran dengan motosikal yang lain itu daripada disebabkan oleh pelanggaran ke atas kaki kanannya oleh kereta defendan pertama. Dalam keadaan yang sedemikian, plaintif telah gagal untuk membuktikan, atas imbangan kebarangkalian, bahawa kecederaan-kecederaannya yang lain, selain daripada kecederaan kaki tersebut, telah disebabkan oleh kecuaian defendan pertama dalam memandu keretanya di jalan tersebut pada waktu yang material itu. Sehubungan itu rayuan tersebut seharusnya ditolak dengan kos.

[Rayuan dibenarkan dengan kos. Perintah-perintah yang bersampingan dibuat. Penghakiman Mahkamah di bawah diubah sehubungan itu].

Cases referred to:
Davie v. New Merton Board Mills Ltd. [1956] 1 All ER 379n ***(refd)***
Owners of Swansea Vale v. Rice [1912] AC 238 ***(refd)***
Jones v. Great Western Railway [1930] 144 LT 194 ***(refd)***
Caswell v. Powell Duffryn Associated Collieries Ltd. [1940] AC 152 ***(refd)***
Guan Soon Tin Mining Co. v. Wong Fook Kum [1969] 1 MLJ 99 ***(refd)***
R v. Burdet [1820] 4 B & Ald. 95 ***(refd)***
Jones v. Dunkel [1959] 101 CLR 298 ***(refd)***
British Railway Board v. Harrington [1972] AC 877 ***(refd)***
Insurance Commissioners v. Joyce [1948] 77 CLR 39 ***(refd)***
Watt v. Thomas [1947] AC 484 ***(refd)***
Benmax v. Austin Motors Co. Ltd. [1955] AC 370 ***(refd)***
Neo Chan Eng v. Koh Yong Hoe [1960] MLJ 291 ***(refd)***
Government of Malaysia & Ors. v. Jumat bin Mahmud & Anor. [1977] 2 MLJ 103 ***(refd)***
Wilsher v. Essex Area Health Authority [1988] 2 WLR 557 ***(refd)***
McGhee v. National Coal Board [1972] 3 All ER 1008 ***(refd)***
Mehmet Dogan Bey v. GG Abdeni & Co. Ltd. [1951] 2 KB 405 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 106

Other sources referred to:
Atkins Court Forms Vol. 29, 1976 Issue, p. 62, Form 48
Charlesworth and Percy on Negligence, 8th Edn., (1990) para 5-32
Negligence on the Highway, Law and Practice, O.C. Mazengarb, 4th Edn., at pp. 116 and 117

For the appellant - G. Sri Ram (V. Sithambaram with him); M/s. Kumar, Sitham & Co.
For the respondents - Bala Mahesan; M/s. Bala Mahesan & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:

The undisputed facts underlying this appeal by the plaintiff motor-cyclist in a running down case, involving him and a motor-car driven by the defendant driver, proceeding in opposite directions, have been sufficiently set out in the dissenting judgment of our learned brother Mohamed Dzaiddin SCJ, which we have had the advantage of reading in draft, and, so, it would be tedious and unnecessary to recapitulate them at any length. Suffice it to say, that what we propose to do is to indicate, with great respect, why we

are unable to agree with his evaluation of those undisputed facts and his conclusion that the appeal should be dismissed, thus resulting in the affirmation of the judgment of the trial Judge (Abdul Hamid bin Haji Mohamed, J.).

Now, the trial Judge had held that although the plaintiff had sustained injuries, to his head and right leg, only the latter injury had been caused as a direct result of the collision involving the plaintiff and the defendant driver's car; the former, that is to say, the far more serious head injury, having been caused as a direct result of a prior collision involving the plaintiff's motor-cycle and another motor-cycle, the rider of which, we must point out, was never cited as a party or even called as a witness.

In embarking upon a consideration of this appeal, therefore, some degree of repetition as to the course which the proceedings took in the Court below and to the undisputed facts, will be inevitable.

Clearly, the judgment of the trial Judge is based on the **assumption** that causation was in issue notwithstanding the oral agreement of Counsel before the commencement of the trial that general damages be agreed at RM150,000 (hereinafter referred to as "the agreement aforesaid" unless the context otherwise requires).

If, therefore, it could be demonstrated that by reason of the agreement aforesaid, causation was no longer in issue; the only issue remaining being negligence, in the sense of blameworthiness or fault of the defendant driver and/or the plaintiff, which the trial Judge had decided in favour of the plaintiff on a 100% basis, then, in our view, as a matter of logic, there could be no foundation for that **assumption** and so the judgment of the trial Judge would become vulnerable.

In his judgment, the trial Judge never so much as even mentioned the agreement aforesaid, much less considered and decided its effect. But on appeal, this became a key issue.

The principal task for us, therefore, regarding this part of the case, is one of construction, that is to say, to determine the meaning and effect of the agreement aforesaid. This in turn calls for a determination of the common intention of Counsel for the parties. We venture to suggest that there is a **conclusive** way of testing the rival contentions of Counsel before us on this key issue and it is this:

If Counsel for the defendants is correct in his contention before us that causation remained a live issue at the trial despite the agreement aforesaid, why then did not both Counsel at the trial agree on the **apportionment** of general damages, more particularly, so much for general damages for the head injury and so much general damages for the leg injury? Instead, they had agreed general damages at RM150,000 and this, obviously, was not just for the injury to the leg but for **all** injuries, **including the head injury,** thereby indicating that causation ceased to be an issue, the only issue remaining being negligence in the sense of blameworthiness or fault of the defendant driver and/or, of the plaintiff.

The **subsequent conduct** of the litigation by Counsel for the defendants at the trial, in agreeing to the medical reports on the plaintiff "as to maker and contents", which covered **all** injuries, **including the head injury,** confirms that Counsel for the defendants was **representing** to the Court and to his opponent, that causation with regard to the head injury, was no longer in issue.

At this point, we would interpolate to observe, that the Orthopaedic Surgeon Mr. M. Shanmugam, when referring to the history of the plaintiff's injuries, began his report

by saying that the plaintiff "was apparently a motor-cyclist who was involved in a collision with a car...". The report by the neuro physician Dr. C. Bala Ratnam contains a statement to the like effect.

Surely, if causation remained an issue, more particularly, if it remained an issue, whether the head injury was the direct result of the collision involving the plaintiff and the defendant driver's car **or** the direct result of a prior collision involving the plaintiff's motor-cycle and the other motor-cycle, the medical reports would never have been agreed by Counsel for the defendants "as to maker and contents".

As a result of relying on the representation aforesaid of Counsel for the defendants, Counsel for the plaintiff at the trial was **induced** to refrain from calling the medical witnesses - two from Kuala Lumpur and one from Penang - who we were told had been *subpoenaed* and were present in Court, and whose testimony would have been most material to the issue of causation. In our view, therefore, the agreement aforesaid was binding on Counsel for the defendants and he should not now be allowed to resile from it.

It follows, therefore, that the meaning and effect of the agreement aforesaid having regard to the common intention of the parties, was that causation was no longer in issue, when the trial commenced; the **only** remaining issue being negligence, in the sense of fault or blameworthiness, as between the plaintiff and the defendant driver, which eventually, the Judge had decided in favour of the plaintiff on a 100% basis.

But, it was further argued by way of alternative, that as soon as the trial Judge had pronounced his decision on the issue of causation in favour of the defendant driver, Counsel on both sides had arrived at a **subsequent agreement,** announced in open Court, whereby general damages had been agreed at RM10,000, and that accordingly, this constituted a waiver or vacation of the original agreement (hereinbefore referred to as "the agreement aforesaid").

This submission is plainly without merit and therefore quite untenable. It is manifestly clear, that the subsequent agreement was merely consequential on the trial Judge's finding that the defendant driver had caused the injury to the plaintiff's leg only but not the injury to his head. By this subsequent agreement, Counsel were merely relieving the trial Judge of the task of assessing general damages for the leg injury, in view of his finding on causation. It could not possibly amount to a waiver of the original agreement announced by Counsel in open Court, before the commencement of the trial, simply because there never was any intention to waive. The situation is analogous to what happens at a criminal trial when the Court finds an accused guilty and Counsel makes a submission in mitigation. It is too well known to need citation of authority that such a submission does not preclude an appeal against conviction.

Having regard to our conclusions regarding the construction of the agreement aforesaid and the subsequent agreement, we would, on this ground alone, allow the appeal.

But, in our view, on two further grounds also, the appeal must succeed.

Putting aside the agreement aforesaid, the **second point** we should like to consider concerns the **pleadings** in the case; more particularly, the defence filed.

Before us, the primary submission of Counsel for the defendants was a denial of causation with regard to the head injury; more particularly, that that injury had been caused as a result of the prior collision involving the plaintiff and the other motor-cycle.

However, this point was never pleaded with sufficient particularity, as it undoubtedly should have been. The proper manner of pleading such a point appears in **Atkins** Vol. 29, 1976 Issue, p. 62, Form 48, where the precedent says:

> Further or alternatively the matters complained of were caused wholly by the negligence [and/or breach of statutory duty] of X, Y.

Indeed, if a defendant seeks to avoid liability by blaming a third party, the better practice is for him to plead it specifically instead of merely relying on a denial of negligence because the plaintiff might otherwise be taken by **surprise.** (See *Davie v. New Merton Board Mills Ltd.* [1956] 1 All ER 379n.)

This is precisely what happened here. Relying on the agreement aforesaid, Counsel for the plaintiff had assumed that causation was no longer in issue, the only issue remaining being negligence in the sense of blameworthiness or fault, and as a result, did not call the medical witnesses whose testimony on causation, as we have already noted, would have been most material. He was thus taken by **surprise** when Counsel for the defendants took up the causation point with regard to the head injury - a point which unfortunately commended itself to the Judge.

The **third point** we should like to consider, may be conveniently described as the **natural justice point.** In our view, it was neither right nor fair to find that the plaintiff's head injury had been caused as a result of the prior collision involving the plaintiff's motor cycle and the other motor-cycle, without hearing the rider of the other motor-cycle. Indeed, as we have mentioned, at the outset, he was never cited as a party in the suit or even called as a witness, and no explanation had been vouchsafed to the trial Court for this glaring omission. There was, therefore, a clear breach of the rule of natural justice embodied in the maxim: *Audi alteram partem,* when the trial Judge had found that the plaintiff's head injury was the direct result of the prior collision with the other motor-cycle, considering that the other motor-cyclist never had the opportunity of being heard.

That would be sufficient to dispose of this appeal in favour of the plaintiff, but having regard to the trial Judge's finding - concurred in by our brother Mohamed Dzaiddin SCJ - that upon the evidence adduced at the trial, it could be **inferred** that the plaintiff's head injury had been caused as a result of the plaintiff's falling to the ground, following the prior collision involving the plaintiff's motor-cycle and the other motor-cycle, we consider it desirable, that we express our views regarding this part of the case.

This finding by the trial Judge as to the cause of the plaintiff's head injury, was undoubtedly an inference which he drew from the exculpatory portion of the defendant driver's police report - a self-serving out of Court statement, not on oath and not tested by cross-examination - in which no mention was made that he had merely injured the plaintiff's right leg but not the head - and the presence of the imprint of a motor-car tyre on the right trouser leg of the plaintiff.

When, as here, there is no direct testimony as to how a collision had occurred and the plaintiff is left with no alternative but to rely on inferences, the general guidance given by Lord Loreburn in *Owners of Swansea Vale v. Rice* [1912] AC 238, is worth bearing in mind:

> What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other.

In *Jones v. Great Western Railway* [1930] 144 LT 194, 202, Lord Macmillan explained the meaning of an inference and its effect in law, thus:

> An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction it may have the validity of proof.

The question therefore arises, what is a reasonable inference? The answer to this question is provided by Lord Wright in *Caswell v. Powell Duffryn Associated Collieries Ltd*. [1940] AC 152 at 169:

> Inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In the present case, we are of the view that - in the words of Lord Wright in *Caswell's* case - there were no objective facts from which it could be inferred, as a matter of reasonable probability, that the plaintiff had sustained the head injury as a result of falling to the ground following the prior collision with the other motor-cycle. We accept, however, that upon the evidence, it was **possible** that he had sustained the head injury in that way. It was equally possible that he had not. So there was insufficient evidence to connect the head injury with the other motor-cycle. In this context, we are reminded of the words of Suffian FJ (as he then was) in *Guan Soon Tin Mining Co. v. Wong Fook Kum* [1969] 1 MLJ 99 at 103 col 2 F and F:

> There was no positive proof, as there was in the *Granby* case, *supra*, that the discharge from the defendant's mine had anything to do with the death of the fish; there was **only a possibility.**
> (Emphasis supplied).

With respect, it would, therefore, be pure conjecture or a mere guess, to say that the plaintiff's head injury had been caused as a result of his falling to the ground following the prior collision with the other motor-cycle. And, it is axiomatic that the Court is not entitled to guess.

But, on the contrary, there were objective facts in the shape of the admission in the defendant driver's police report, corroborated by the testimony of two witnesses (PW2 and PW3) - accepted by the trial Judge - and who, although not eye witnesses, had arrived on the scene soon after the collision and had seen the plaintiff lying across the white centre line with the imprint of a motor-car tyre on his right trouser leg, which clearly indicated that the defendant driver's car had, indeed, collided into the plaintiff while he lay on the road.

In the **absence of evidence to the contrary,** - and there was none - it could reasonably be inferred from the objective facts aforesaid that **both** the leg injury and the head injury had been caused by the collision involving the defendant driver's car. The next point to be logically considered in this context is the burden of proof.

It is right to say at the risk of being trite that there is a distinction between the legal burden of proof and the provisional or evidential burden of proof. The distinction is well brought out by the late Mr. O.C. Mazengarb, QC, in his highly regarded work entitled

"Negligence on the Highway, Law and Practice", 4th Edition at pp. 116 and 117, thus:

> A distinction is drawn between the "legal burden" of proof which always rests on the plaintiff (or defendant in a cross-suit) and a provisional burden. The former is imposed by the law itself; the latter is a burden which is created by the state of the evidence. A piece of evidence may raise a "presumption" or a "*prima facie*" case in the sense that if nothing more is proved the Court may (but not necessarily must) infer that there was negligence and may call upon the other party to answer that piece of evidence. But it is only a provisional burden which may be answered by evidence or by argument. It is not a compelling presumption; it is only a provisional one which may shift from one party to the other and back again as the case proceeds. (See *Brown v. Rolls Royce Ltd.* [1960] 1 WLR 110).

In our view, regard being had to the circumstances of the case, once the plaintiff had established that he had been struck by the defendant driver's car, while he lay across the white centre line of the road, there was a *prima facie* case that **both** the leg injury **and** the head injury had been caused by the defendant driver's car.

The provisional or evidential burden of proof, as opposed to the legal burden of proof, which had been raised by the state of the evidence, should then have shifted to the defendant driver to rebut the *prima facie* case, by showing, if he could, that only the leg injury but not the head injury, had been caused by him, since this was a matter especially within his knowledge. We are supported in this by s. 106 of the Evidence Act (Revised - 1974) which provides:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Nevertheless, the defendant driver who was present in Court and was the only person who had the necessary knowledge to testify as to the causation point had studiously elected not to give evidence. This omission by the defendant driver to testify should strengthen the inference that could reasonably be drawn from the facts proved by the plaintiff (See *R. v. Burdet* [1820] 4 B & Ald. 95 at pp. 161, 162; *Jones v. Dunkel* [1959] 101 CLR 298).

True it is that a defendant is entirely within his legal rights when he elects not to go into the witness box to give his explanation of the events in question, but in a case which must depend on his credibility, he takes that course **at his peril.** It would be legitimate to ask "Why, if the defendant driver's story were true, that he did not cause the head injury, did he studiously elect not to go into the witness box?" No explanation for this glaring omission was vouchsafed to the trial Judge.

In *British Railway Board v. Harrington* [1972] AC 877 at 930, a House of Lords case, where the defendant called no evidence, Lord Diplock said this:

> This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the Courts draw from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Also noteworthy in this context, is what Rich J. forcefully said in *Insurance Commissioners v. Joyce* [1948] 77 CLR 39 at 49:

> When circumstances are proved indicating a conclusion that the only party who can give direct evidence of the matter prefers the well of the Court to the witness box, a Court is entitled to be bold.

The plaintiff himself also did not testify but this was because of the effect of the appalling injury he had sustained to his head - a fact which was agreed at the trial.

It is our firm and considered view that the defendants having through their Counsel elected to call no evidence, had clearly failed to rebut the *prima facie* case established at the close of the case for the plaintiff that **both** the leg injury and the head injury had been caused by the defendant driver's car. Thus, the trial Judge's finding on the issue of causation in favour of the defendant driver was against the weight of the evidence. We, therefore, reverse this finding made by him and substitute, in lieu thereof, a finding in favour of the plaintiff. The trial Judge, however, was correct in finding the defendant driver 100% to blame or at fault, for the collision and, indeed, a cross-appeal by the defendants on this issue was withdrawn.

By way of postlude, we must add a final point regarding this part of the case lest we be accused of an oversight. We recognise, as we must, that a Court of Appeal, will naturally be reluctant to interfere with a finding of fact by the trial Judge who has had the inestimable advantage of watching the demeanour of the witnesses, "their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial." (Per Lord Macmillan in *Watt v. Thomas* [1947] AC 484, at 490-1). But, having said that, we would draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case - and the present case is such a case - the Appellate Court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts. (See *Benmax v. Austin Motors Co. Ltd.* [1955] AC 370).

For the various reasons adumbrated above, we would allow this appeal and enter judgment for the plaintiff in the sum of RM150,000 for general damages, to include the head injury, against both the defendants. For the avoidance of doubt and in order to give full effect to the terms of the agreement aforesaid (particulars whereof appear at page 38 of the Appeal Record), which we have found to be binding upon the parties, we make the following consequential awards in favour of the plaintiff:

(1) interest on the award of general damages of RM150,000 for all injuries, at the rate of 8% p.a. from 25 August 1986 to date of judgment;

(2) (i) RM18,209.40, being pre-trial loss of earnings, with interest thereon, at 4% p.a. from 23 June 1984 (the date of accident) to date of judgment;

(ii) RM13,000, being post-trial loss of earnings, without interest;

(3) (i) RM23,400, being pre-trial nursing care, with interest thereon, at 4% p.a. from 23 June 1984 to date of judgment;

(ii) RM12,780 being post-trial nursing care, without interest.

The judgement of the Court below is, to the extent indicated above, varied accordingly.

The defendants must pay to the plaintiff, the costs of the appeal and there will be the usual order for refund to the plaintiff of the deposit paid by way of security for costs.

Mohamed Dzaiddin bin Haji Abdullah SCJ:

This is an appeal by the plaintiff, now the appellant, from the judgment of the High Court Pulau Pinang delivered on 24 April 1991 against an award of damages for injuries suffered by him as a result of a collision between his motorcycle PV 8249 and motorcar PAW 2857 driven by the first defendant as servant or agent of the second defendant

along Jalan Raya, Nibong Tebal, Seberang Perai (the said road) on 23 June 1984. The trial Judge found the first defendant negligent and wholly to blame for causing injuries to the appellant's right leg and awarded him RM10,000 and RM2,500 as general and special damages respectively.

The amended statement of claim alleged that at the material time, the plaintiff was lawfully riding his motorcycle along the said road when the first defendant driving motorcar PAW 2857 caused, permitted or allowed the said car to encroach into the plaintiff's lawful path and collided into him. By a further amendment made in the course of the trial on the "Particulars of Negligence", it was alleged that the said collision was due to the defendant "causing, permitting or allowing the said motorcar to collide into the plaintiff who was lying in the centre of the road." The first defendant denied that he was guilty of the alleged or any negligence and averred that the said collision was wholly caused or substantially contributed to by the negligence of the plaintiff. It was further averred that the alleged loss and damages set out in the amended statement of claim was not caused or occasioned by the first defendant's negligence.

The hearing in the Court below was only on liability as at the conclusion of PW3's evidence Counsel informed the trial Judge that they had agreed on the quantum. In order to appreciate how the argument in the appeal was shaped, it is necessary to examine the Judge's note of proceedings and his grounds of decision. When the trial commenced on 28 March 1991, all the bundles of documents were marked and agreed upon by both Counsel. Encik Bala Mahesan, Counsel for the defendants, agreed that the contents of Agreed Bundle "B", the Disagreed Bundle "C". and the Additional Disagreed Bundle "D" be admitted without calling their makers. The learned trial Judge then noted that '"B", "C" dan "D" dipersetujui as to the maker and content'. The Court then proceeded to hear and record the evidence of the plaintiff's witnesses, namely, PW1, PW2 and PW3. At the conclusion of the evidence of PW3, the Court adjourned the hearing at the request of both Counsel for them to discuss the matter. On resumption, Encik Sithambaram, Counsel for the plaintiff, informed the Court that both parties had agreed on quantum and closed the plaintiff's case. Thereupon, Encik Bala Mahesan informed the Court that he did not wish to call any evidence even when the first defendant was present, but would proceed to make his submission. I believe this was a necessary consequence of the course which the case took that the learned Counsel offered no further evidence which, in my opinion, he was entitled to do. The trial Judge then recorded the agreed quantum on the following terms:

Maklumkan:

Quantum yang dipersetujui berdasarkan 100% liabiliti:

a. Ganti rugi am RM150,000.00

   Faedah 8% setahun mulai 25 Ogos 1986

b. Ganti rugi khas bagi perenggan 8(a) - (g) berjumlah RM2,750.00

c. (i) Kehilangan pendapatan sebelum perbicaraan RM18,209.40 dengan faedah 4% daripada tarikh kemalangan (23 June 1984) hingga keputusan;

   (ii) Kehilangan pendapatan selepas perbicaraan sebanyak RM13,000 tanpa faedah;

d. Ganti rugi penjagaan (nursing care)

   (i) sebelum perbicaraan RM23,400.00 dengan faedah 4% daripada tarikh kemalangan sehingga keputusan;

   (ii) selepas perbicaraan RM12,780.00 tanpa faedah.

When the case resumed on 29 March 1991, both Counsel applied for amendments of their respective pleadings. The plaintiff's amendment was to add under the "Particulars of Negligence" the words "lying in the centre of the road". The Court then heard submissions of Counsel on liability and adjourned the case for decision to 24 April 1991. On 24 April 1991, the trial Judge delivered the following decision. He found the first defendant 100% liable and the plaintiff not guilty of any contributory negligence. However, he found the liability of the first defendant was only in respect of the plaintiff's leg, i.e. laceration on skin about 10 c.m. and fracture of lower 1/3 right tibia/fibula, for which he awarded the plaintiff general damage in the sum of RM10,000 with interest at 8% p.a. from 25 August 1986 and special damage for RM2,750 with interest at 4% p.a. from 23 June 1984 and costs.

In his grounds of decision in Bahasa Melayu, the trial Judge gave the following reasons. At the outset, it should be noted that as neither the plaintiff nor the first defendant gave evidence, the trial Judge based his decision on the evidence of the I.O. (PW1), PW2 and PW3 as well as the mute testimony of the police report, sketch plan and photographs. From the first defendant's police report no. 1492/84, which formed the basis of the plaintiff's case, he came to a conclusion that the plaintiff was involved in an earlier collision with another motorcycle before his collision with the first defendant's motorcar occurred. According to the police report, both motorcyclists fell on the centre of the road. However, the other motorcyclist managed to pull up. The first defendant stated that as he was then too close to the fallen motorcycle, he could not control his motorcar to avoid colliding into the said motorcycle.

Next, the trial Judge accepted the evidence of PW2 and PW3 who stated that on reaching the scene of the accident, they saw the plaintiff lying across the centre of the road. They also noticed tyre mark on his right trouser leg. From this, he drew an inference that the defendant's car ran over the plaintiff's right leg. The trial Judge then reminded himself of the prior collision between the plaintiff's motorcycle and another motorcycle where both motorcycles fell on the road. From this fact, he drew an inference that the plaintiff fell from his motorcycle before his leg was run over by the first defendant's car. He then concluded as follows (at p. 16 of the Appeal Record):

> Tidak terdapat apa-apa keterangan lain yang merujukkan bahawa plaintif "dilanggar" oleh kereta yang dipandu oleh defendan pertama dan akibatnya plaintif mengalami **semua** kecederaan yang dialaminya. Oleh sebab itu saya berpendapat bahawa, mengikut keterangan yang ada, hanya kecederaan di kaki kanan plaintif sahaja yang boleh dipertanggungjawabkan kepada defendan pertama.

Literally translated, there was no other evidence from which it could be inferred that the plaintiff's collision with the first defendant's motorcar was the sole cause of **all** his injuries and loss. In the result, he held the first defendant liable only for the injuries to the plaintiff's right leg.

This appeal was against an award of damages which was argued on the basis that the trial Judge, after recording the agreed quantum and having found that it was the first defendant's negligence which caused the plaintiff's injuries and loss, should have awarded damages based on the amount agreed by the parties. Encik Sri Ram submitted that as the parties had agreed on damages on the basis of 100% liability, the Court should not have interfered with the issue of quantum and varied it after liability was determined since the defendants, through their Counsel, had conceded to the injuries

sustained by the plaintiff based on the agreed medical and specialist reports. It was further submitted that because of the compromise reached on the quantum, the plaintiff did not call any medical and expert evidence to show that the injuries which the plaintiff suffered were more consistent by being run over by a motorcar as compared to a fall after a collision with another vehicle. According to learned Counsel, the Judge was wrong when he made his decision on the injuries and damages without referring to or considering the compromise on the damages reached by the parties.

It must be remembered that in running-down cases, it has been the practice recognised by our Courts for Counsel representing parties to an action to try and agree on the issue of quantum or liability before the trial with a view to saving time and expense. But, whatever amount is agreed as damages, it will still be subject to the question of liability as it must be borne in mind that, in an action for negligence, the issue of damages presupposes that all questions of liability have been decided. Precisely, this was the approach adopted by the trial Judge when he proceeded to decide on the issue of liability.

Turning to the issue of liability, the question is whether the first defendant's act in driving the said motorcar caused **all** the injuries and loss suffered by the plaintiff. That, in my view, turns primarily on the question of causation, where the onus of proving it always lies on the plaintiff. Here, the plaintiff must prove on a balance of probabilities that it was the first defendant who caused all his injuries (*Neo Chan Eng v. Koh Yong Hoe* [1960] MLJ 291; *Government of Malaysia & Ors. v. Jumat bin Mahmud & Anor.* [1977] 2 MLJ 103). In *Wilsher v. Essex Area Health Authority* [1988] 2 WLR 557, the House of Lords had occasion to re-examine the question of causation in the light of an earlier House of Lords' decision in *McGhee v. National Coal Board* [1972] 3 All ER 1008. According to Lord Bridge, *McGhee's* case lays down no new rule and does not challenge the basic proposition that the burden of proof of causation lies upon the plaintiff. His Lordship then continued (at p. 569):

> On the contrary it affirmed the principle that the onus of proving causation lies on the plaintiff. Adopting a robust and pragmatic approach to the undisputed facts of the case, the majority concluded that it was a legitimate inference of facts that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff ... must discharge once he has established a relevant breach of duty is a fruitless one.

It is a question of fact, whether any particular head of damage is so caused by a defendant's negligence or breach of statutory duty (per McNair J. in *Mehmet Dogan Bey v. G.G. Abdeni & Co. Ltd.* [1951] 2 KB 405, 411). Further, it must be remembered that "whatever evidence is so-called, it must stand to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that, on a balance of probabilities, the most likely cause of the damage was the negligence ... by the defendant, his servant or agent and not solely the negligence ... of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result, whether this happens to be expressed in terms of lack of causation or for reasons of remoteness." **[Charlesworth and Percy on Negligence,** 8th Edn., (1990) para 5-32].

Applying the above principles of causation, can it be said that the trial Judge was justified in his finding that the first defendant was liable only for causing the injuries to the plaintiff's right leg and not all other injuries? It would appear to me from the evidence before him, the trial Judge made two crucial findings of fact. First, based on the first defendant's police report, which he stated as forming the basis of the plaintiff's case, the trial Judge found the plaintiff was involved in a collision with another motorcycle before the first defendant's motorcar collided into him. From this, he drew an inference that the plaintiff fell from his motorcycle before his right leg was run over by the first defendant's motorcar. Secondly, he accepted the evidence of PW2 and PW3 that they saw the plaintiff lying across the white centre line. They noticed the tyre mark of a motorcar of about 1 foot wide on the plaintiff's right trouser leg. From this, the trial Judge drew yet another inference that it was the first defendant's motorcar which ran over the plaintiff's right leg.

In my opinion, looking at the available evidence, bearing in mind that neither the plaintiff nor the first defendant gave evidence, his Lordship had drawn correct inferences from those facts. "An inference in the legal sense is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof" (per Macmillan in *Jones v. G.W. Ry* [1930] 144 LT 194, 202). Finally, based on the above finding, the trial Judge concluded that the first defendant was responsible only for the injuries to the plaintiff's right leg as there was no other evidence which showed that all the plaintiff's injuries were caused by the defendant's negligence.

On my part and in my considered opinion, the trial Judge was correct in his finding. There was no evidence to suggest that all other injuries sustained by the plaintiff were caused by or were the direct result of the collision between the plaintiff and the first defendant's motorcar. It would be a matter of conjecture if we were to hold that the brain injury was the direct result of the first defendant's negligence when the trial Judge had come to the conclusion that there was no other evidence which showed that the first defendant was responsible for all the injuries suffered by the plaintiff. From the evidence as found by the trial Judge, the plaintiff's brain injury would appear to be more consistent with his falling from his motorcycle as a result of the collision with the other motorcycle rather than due to his right leg being run over by the first defendant's motorcar. In the final analysis, it is my conclusion that the plaintiff has failed to prove, on a balance of probabilities, that his other injuries, aside from the leg injury, were caused by the first defendant's negligence in driving his motorcar PAW 2857 on the said road at the material time. Accordingly, I would dismiss this appeal with costs.